82-1117

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

vs.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Date: December 30, 1982

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QUESTION PRESENTED

Whether the retention by Cook County of the interest earned on the refundable portion of bail bond deposits constitutes a taking without just compensation of the private property of those bail bond depositors who are ultimately discharged from all obligations under the bail bond and become entitled to a refund thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

VS.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Jerome P. Jamroch, individually and as representative of a class of persons similarly situated, prays that a writ of certiorari issue to review the order and judgment of the Appellate Court of Illinois, First Judicial District, entered on March 15, 1982, as thereafter supplemented on April 19, 1982, upon denial of rehearing.*

* Pursuant to Supreme Court Rule 28.1, Petitioner states that the only parties to this proceeding are Jerome P. Jamroch, Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois, Edward J. Rosewell, Treasurer of Cook County, Illinois, and the County of Cook, a body politic of the State of Illinois.

OPINIONS BELOW

The order of the Supreme Court of Illinois denying Petition for Leave to Appeal is set forth at page A-1 of the Appendix hereto. The denial of the petition for rehearing in the Appellate Court of Illinois is reproduced at page A-2 of the Appendix. The order of the Appellate Court disposing of the appeal under Illinois Supreme Court Rule 23 is not published or otherwise reported, and is set forth commencing at page A-3 of the Appendix. The supplemental Rule 23 order of the Appellate Court upon denial of rehearing is not published or otherwise reported, and is set forth commencing at page A-7 of the Appendix. The unpublished opinion of the Circuit Court of Cook County, Illinois, is set forth beginning at page A-9, and the unpublished final judgment of that court appears at page A-23 of the Appendix.

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal was entered on October 5, 1982, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

The Constitution of Illinois, Article 1, §15, states:

> "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law."

IL Rev. Stat., ch. 38, ¶110-7 (See Appendix at A-24).

STATEMENT OF THE CASE

Petitioner, Jerome D. Jamroch, was arrested in Cook County in September, 1980, and charged with the criminal offense of attempted theft. For the purpose of securing a release from custody and assuring his appearance in court to answer the charge, Petitioner executed and delivered to the Respondent Finley, Clerk of the Circuit Court of Cook County, a bail bond in the principal amount of $1,000. Pursuant to the provisions of IL Rev. Stat., Ch. 38, ¶110-7, Petitioner paid to Respondent Finley a cash deposit in the sum of $100 being 10% of the bond.

Subsequently, the charge pending against Petitioner was stricken with leave to reinstate (referred to under local practice as an "SOL"), Petitioner was discharged of all obligations in the cause, and the conditions of

the bail bond were thereby performed. Accordingly, the Respondent clerk delivered to Petitioner a check for $90, being the amount of his bail deposit less 10% thereof deducted as "bail bond costs" pursuant to IL Rev. Stat., Ch. 38, ¶110-7(f).

The complaint alleged (R. C4) and the Respondents conceded (R. C41), that Petitioner's bail bond deposit, while in the custody of the clerk, was commingled with other bail bond deposits paid by persons similarly situated and invested in interest bearing obligations, and that the interest thereby earned was either retained by the clerk or else delivered over to the Respondent county treasurer, and in either event used for public purposes.

Approximately two months after his discharge and the receipt of his bail refund, Petitioner filed this action on behalf of himself and all other bail bond depositors who had actually become entitled, or would thereafter become entitled, to a refund of 90% of their bond deposits.*

The complaint, relying largely upon this Court's opinion in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), sought a declaratory judgment, an accounting and other relief on the ground that the retention by Respondents of the interest earned on Petitioner's bond deposit constituted a taking of Petitioner's property without just compensation in violation of the Fifth Amendment of the United States Constitution, as well as the comparable clause of the Illinois Constitution (R. C4).

The trial court, after extensive briefing and a full hearing, granted Respondents' motion to dismiss the complaint. In a lengthy opinion rendered from the bench

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* The propriety of class action status was not determined by the trial court, nor by the Appellate Court, and is not involved in this Petition.

(App. A-9), that court held that bail bond deposits do not constitute the "private property" of the depositor, and on that basis sought to distinguish *Webb's Fabulous Pharmacies*. In the course of his opinion, however, the trial judge expressly rejected Respondents' argument that Jamroch's cause was barred under principles of res judicata or collateral estoppel (App. A-11-13).

Petitioner perfected a timely appeal to the Appellate Court of Illinois, First Judicial District. After the case had been fully briefed in that court, but prior to the scheduling of oral argument, the Appellate Court entered a so-called "Rule 23 Order" affirming the trial court judgment on grounds of res judicata (App. A-3). (Under Rule 23, promulgated by the Supreme Court of Illinois, such orders are not published, may not be cited and have no precedential value. IL Rev. Stat., ch. 110A, §23, as amended effective April 1, 1982). A petition for rehearing was thereafter filed and denied, but the denial was accompanied by a Supplemental Rule 23 Order (App. A-7).

As so supplemented, the Rule 23 Order of the Appellate Court held that it was the legal duty of the Petitioner to bring the matter of disposition and distribution of bail funds immediately before the judge in the original criminal court proceeding so that that court could exercise its legal jurisdiction. Neither the original nor the supplemental order addressed itself to the question of whether the instant case and the original criminal court case did or did not constitute the same "cause of action", nor to the consequences of such a determination with respect to the preclusive effect of the earlier judgment, even though that issue had been fully briefed by the parties.

The Illinois Supreme Court denied leave to appeal on October 5, 1982 (App. A-1).

REASONS FOR GRANTING THE WRIT

I.

Review Should Be Granted To Clarify The Application Of *Webb's Fabulous Pharmacies, Inc. v. Beckwith* To Eighth Amendment Rights Regarding Bail Bond Deposits And The Status Of Such Funds Deposited With The State Under The Criminal Justice System In Light Of The Fifth Amendment's Prohibition Against Uncompensated Takings Of Private Property.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court, in a unanimous opinion, held unconstitutional a Florida statute which purported to authorize the court clerk to retain for public purposes the interest earned on interpleaded funds during the time those funds were in the clerk's custody. Inasmuch as the interpleaded fund "plainly was the private property of the persons ultimately determined by the court to be entitled thereto," the interest earned thereon was likewise held to be private property subject to constitutional protection:

> "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: a State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield

against the arbitrary use of governmental power." (449 U.S. at 164).

In this case, as in *Webb's*, the retention of the interest by the county cannot be justified as a fee for services rendered inasmuch as there is a separate statutorily prescribed fee for the clerk's services, i.e., 10% of the bail bond deposit. IL Rev. Stat., ch. 38, ¶110-7(f).

Although the Appellate Court never reached the merits of the constitutional argument, the trial court had sought to distinguish the instant case from *Webb's* on the ground that here there are certain contingencies under which the county may become entitled to the deposit (App. A-13-20). Thus, if the criminal defendant fails to appear for trial the bail bond may become subject to forfeiture, or if he does appear and is found guilty, the deposit may be applied in satisfaction of fines and costs imposed by the court. IL Rev. Stat., Ch. 38, ¶110-7(h). The existence of these possibilities, in the trial court's view, negated the contention that the bail bond deposits are being held only for the benefit of the bond depositors, and not for the benefit of the court or county. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

In truth, however, neither the Petitioner nor any member of the putative petitioner class is subject to these contingencies because the proposed class is defined in the complaint (R. C5) so as to include *only* those criminal defendants who posted a bail bond, paid a 10% deposit, were thereafter discharged of all obligation under the bond, and consequently became entitled to a refund of 90% of their bond deposit. Those criminal defendants who forfeit their bonds, or who are convicted and have their bond deposits applied to the payment of a fine, are not within the plaintiff class.

Apart from this argument, however, the mere existence of a possibility that the bond deposit will be forfeited at

some future time should not serve to deprive that deposit of its status as private property subject to the just compensation requirements of the constitution. Real estate, for example, is indubitably private property even though there always exists the possibility that it will be forfeited to the county, or to a tax buyer, in the event that the owner fails to pay his real estate taxes. Moreover, this Court's opinion in *Webb's* makes it very clear that interest follows the principal and is to be allocated to those who are *ultimately* to be the owners of that principal. Thus, the fact that ownership cannot be conclusively established until the court renders judgment is not significant. That, indeed, was also the case in *Webb's*.

The possibility that the bond deposit may eventually be applied in satisfaction of a fine imposed upon the depositor is even less of an impediment to private property status prior to the occurrence of such an event. Satisfaction of an outstanding indebtedness is clearly a benefit to the bond depositor. If no bond had been posted, the guilty defendant would presumably pay his fine from his own bank account—through an attachment if necessary. But the mere existence of a possibility that a bank account may, at some future date, be applied in satisfaction of an indebtedness to the State, surely does not mean that bank accounts are anything other than private property subject to constitutional protection under the Fifth Amendment.

The proper application of *Webb's Fabulous Pharmacies, Inc. v. Beckwith* to bail deposits is of paramount importance, not only to the Fifth Amendment's guarantee against wrongful takings, but also to the Eighth Amendment's guarantees regarding bail. *Webb's* was a civil dispute among private parties which involved the State only because of the State's relatively passive role as a stakeholder. In contrast, the State in the instant case is far

more deeply involved through the operation of its bail system. Under the Eighth and Fourteenth Amendments, a State can impose only reasonable conditions upon the exercise of the right to bail. *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); *Cohen v. United States*, 82 S.Ct. 526 (1962) (bail "excessive" if used for purposes other than assuring the presence of defendant at trial, i.e., for the collection of fines); *United States v. Skrypeck*, 505 F.2d 458 (D.C. Cir. 1974).

It is respectfully requested that review be granted here to clarify the application of *Webb's* to the constitutional guarantees regarding bail, as well as to make clear *Webb's* application to the taking of interest earned on funds deposited with the State or its instrumentalities in connection with the criminal justice system.

II.

The Nonfederal Ground Upon Which The Appellate Court Affirmed The Dismissal Of The Complaint Is Not Adequate To Deprive This Court Of Jurisdiction.

In its desire to avoid deciding the important federal question raised by the complaint, the Appellate Court, in both of its Rule 23 Orders, simply ignored the long and unbroken line of Illinois decisions which have drawn a distinction between "res judicata", on the one hand, and "estoppel by verdict" or "collateral estoppel", on the other hand, even though that distinction had been fully briefed (R. C36, 77-82) and had been expressly considered by the trial court and ruled upon favorably to Petitioner (App. A-11-13).* It is only where the two causes of action are the

* The more modern terminology, not yet embraced by the Illinois courts, employs instead the concepts of "issue preclusion" and "fact preclusion." See Wright, Miller & Cooper, Federal Practice and Procedure, §§4402, 4406.

same that a party is precluded from raising in the second action an issue which was not actually determined in the earlier case, even though that issue could have been raised and determined in that earlier action. When the two causes of action are different, the preclusive effect of the earlier judgment extends only to issues which were actually decided in that earlier case. The distinction is clearly set forth by the Illinois Supreme Court in *People v. Bone*, 82 Ill.2d 282, 286-7, 412 N.E.2d 444, 446 (1980):

> "There is, however, a difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim or demand and the effect of a judgment as an estoppel in another suit between the same parties on a different claim or cause of action . . . The former constitutes *res judicata* and operates as an absolute bar . . . 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' . . . The latter constitutes collateral estoppel, or estoppel by verdict or judgment . . . and *concludes only 'those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'* Cromwell v. County of Sac (1877), 94 U.S. 351, 353, 24 L.Ed. 195, 197; Skolnick v. Petella (1941), 376 Ill. 500, 503, 34 N.E.2d 825." (Emphasis added.)

Other cases to the same effect include *Pillsbury v. Early*, 324 Ill. 562, 565 (1927); *Hoffman v. Hoffman*, 330 Ill. 413, 417 (1928); *Boddiker v. McPartlin*, 379 Ill. 567 (1942); *City of Elmhurst v. Kegerreis*, 392 Ill. 195 (1945); *Kahler v. Don Williams Co.*, 375 N.E.2d 1034, 1036 (Ill.App. 1978); *Godare v. Sterling Steel Casting Co.*, 430 N.E.2d 620, 622-23 (Ill.App. 1981). Indeed, the same court which decided this case had recently reached an opposite result in circumstances which the trial judge here found indistinguishable. *Chicago Park District v. Kenroy, Inc.*, 374

N.E.2d 670, 677-78 (Ill.App. 1978), aff'd. in relevant part, 78 Ill.2d 555, 567 (1980).*

The Appellate Court's heavy reliance upon its own opinion in *Morgan v. Finley*, 105 Ill.App.3d 80 (1982), rendered on the same day as the Rule 23 Order in this case, is clearly misplaced. In *Morgan*, the judge in the original criminal proceeding had expressly ruled upon the issue which the plaintiff there later sought to raise in a collateral action rather than through a direct appeal. In the instant case, by contrast, the question of Petitioner's right to interest was neither raised nor decided in the criminal court action.

This Petitioner recognizes that the courts of Illinois must remain free to change the law from time to time, even though every such change inevitably defeats the reasonable expectations of litigants and prospective litigants. Yet, in the instant case it is entirely clear that the Appellate Court did not intend any such change. The use of a Rule 23 Order, which is unpublished, noncitable and expressly lacking in precedential value, absolutely precludes any such contention.

This Petitioner recognizes that it is not the function of the Supreme Court of the United States to correct errors of law made by state courts in the interpretation of state

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* The Appellate Court's attempt to distinguish *Chicago Park District v. Kenroy, Inc.* (App. A-5-6) is so patently question-begging as to confirm that Petitioner is correct in his contention that the ruling below has at least the effect, if not the intent, of evading review of the federal question. In both *Kenroy* and the instant case, the court which heard the earlier action indisputably had jurisdiction to determine the issue which was not actually raised, but which *could have been* raised there. In both cases, the earlier forum was not the "appropriate" or customary forum to litigate that issue.

law. Nevertheless, this Court has consistently recognized that where a federal claim has been properly asserted in a state court, and the claim is defeated on nonfederal grounds—especially nonfederal procedural grounds—it always remains within the province of this Court to determine whether that federal right "was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support . . . [I]f nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward v. Board of County Commissioners of Love County*, 253 U.S. 17, 22 (1920). To the same effect, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1922) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *Wolfe v. State of North Carolina*, 364 U.S. 177, 186 (1960) ("It thus becomes this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment."); *Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965) ("The adequacy of state procedural bars to the assertion of federal questions is itself a federal question."); *Abie State Bank v. Weaver*, 282 U.S. 765, 772-73 (1931).

The employment by a state court of a novel procedural requirement—one without precedent in prior decisions—as a means of defeating the federal claim has not been countenanced by this Court. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 456-58 (1958); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679-81 (1930); *NAACP v. State of Alabama ex rel. Flowers*, 377 U.S. 288, 296-302 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964); *Wright v. State of Georgia*, 373 U.S. 284, 291 (1963).

Most closely in point, perhaps, is *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464, 473 (1918), in which this Court set aside a judgment of the Kentucky Court of Appeals which had upheld the defense of res judicata as a bar to the assertion of a federally grounded defense to a tax collection action. This Court first said: "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if it does not, it is our duty to review and correct the error." Then, after setting forth the "universally accepted" doctrine of res judicata, and inferring that "its obvious application to the facts of this case was inadvertently overlooked by the Court of Appeals," this Court went on to state:

> "*Res judicata*, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment?"

The Court assumed an affirmative answer to the first query, but answered the second in the negative because the decision below was "so clearly ill founded that it cannot sustain the judgment."

See also cases such as *Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964), holding that an erroneous state court finding of mootness cannot serve to deprive this Court of jurisdiction to determine a properly raised federal question, and *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 744-45 (1929), rejecting a state court finding of laches as a bar to a federal claim because it lacked "fair support." Cf. *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964) ("state procedural

requirements which are not strictly or regularly followed cannot deprive us of the right to review.")

In light of established Illinois precedent, Petitioner here simply could not have anticipated that his failure to raise the question of interest in the original criminal court action (conceding that the question *could* have been raised there) would serve to deny him any opportunity to argue that issue in any forum, at any time. Petitioner respectfully suggests that the action below constitutes a deprivation of basic due process rights. But whether or not that is the case, it surely does not meet the requirements of an adequate nonfederal ground for decision so as to deprive this Court of jurisdiction to decide the underlying federal question.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: December 30, 1982

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October 5, 1982

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No. 56746—Jerome P. Jamroch, Indv., etc., petitioner, vs. Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

IN THE
APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Plaintiff-Appellant,

No. 81-1517 *v.*

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, and the COUNTY OF COOK, a body politic,

Defendants-Appellees.

ORDER

Upon consideration of the petition for rehearing filed on April 5, 1982, by plaintiff-appellant, said petition is hereby DENIED in accordance with Supplemental Rule 23 Order this day filed.

ENTER:

/s/ Mayer Goldberg
Justice

/s/ Thomas A. McGloon
Justice

/s/ John M. O'Connor, Jr.
Justice

ORDER ENTERED
APR 19 1982

FIRST DISTRICT
Filed March 15, 1982

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Plaintiff-Appellant,

81-1517 *v.*

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, and the COUNTY OF COOK, a body politic,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
The Honorable George J. Schaller, *Judge Presiding.*

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Jerome P. Jamroch (plaintiff) brought this purported class action to recover interest earned on the refundable portions of bail bond deposits while such deposits were in the custody of Morgan M. Finley, the clerk of the circuit court. The trial court granted the motion of Finley, Cook County treasurer Edward J. Rosewell and the County of Cook (defendants) to dismiss the complaint. Plaintiff appeals.

The facts of this case as set forth in plaintiff's complaint are not in dispute. On or about September 18, 1980, plaintiff was arrested in the city of Chicago and charged with attempted theft. Plaintiff executed and delivered to

the clerk of the circuit court a bail bond for $1,000. Pursuant to statutory provisions (Ill. Rev. Stat. 1979, ch. 38, par. 110-7), plaintiff paid over to defendant Finley a cash deposit of $100, being 10% of the bail.

On or about December 16, 1980, the charge pending against plaintiff was stricken with leave to reinstate and plaintiff was discharged of all obligations in the cause. Pursuant to section 110-7(f) of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 110-7(f)), Finley delivered to plaintiff a check in the sum of $90, that being the amount of plaintiff's deposit less 10% thereof deducted as "bail bond costs."

The complaint further alleged, upon information and belief, plaintiff's bail bond deposit was commingled with other such deposits while in the possession of the court clerk and invested in interest-bearing accounts. Plaintiff alleged this interest was either retained by the clerk or delivered over to defendant Rosewell for the benefit of Cook County. The complaint alleged the retention of this interest and the failure to pay it over to plaintiff and the plaintiff class members who actually received their statutory refunds constituted a taking of private property without just compensation. Plaintiff accordingly sought a declaratory judgment and further requested defendants to account for interest withheld from the plaintiff class subsequent to February 18, 1971. Plaintiff also sought a preliminary injunction requesting sequestration of the interest pending final adjudication.

The trial court found the case should not be dismissed as an improper collateral attack on the order of the court which heard the criminal case. However, the trial court dismissed the complaint on the ground the bail bond deposits did not constitute the private property of the depositors.

In our opinion, the complaint was properly dismissed. Our ruling is based, however, on our finding the case is in fact an improper collateral attack. This decision is based in part on our opinion in *Morgan v. Finley* (Docket No. 80-2110, filed March 15, 1982), ... Ill. App. 3d ....., ... N.E.2d ..... These cases have many similarities.

In *Morgan*, the plaintiff had been placed under supervision pursuant to an order in a previous action. This order included judgment for fines and costs. (See Ill. Rev. Stat. 1979, ch. 38, par. 1005-6-3.1(c).) Morgan took no appeal from that order. In a separate action, Morgan argued the imposition of fines and costs as an incident to the supervision order was unconstitutional. In deciding the suit was an improper collateral attack on the prior order, we relied on *Sanner v. Champaign County* (1980), 88 Ill. App. 3d 491, 410 N.E.2d 656. The *Sanner* court held an independent action challenging the orders concerning fines and costs would be an improper collateral attack if the initial judgment order had been a final appealable order. (88 Ill. App. 3d 491, 497.) We held the order of supervision in *Morgan* was an appealable interlocutory order pursuant to Supreme Court Rule 604(b) (73 Ill. 2d R. 604(b)) and our holding in *People v. Tarkowski* (1981), 100 Ill. App. 3d 153, 160, 426 N.E.2d 631. Thus, we followed *Sanner* in affirming the dismissal of the action.

The facts in the instant case are very similar to *Morgan*. There is no question but that the order dismissing the charges against Jamroch was an appealable order under Supreme Court Rule 602 (73 Ill. 2d R. 602). The portion of the judgment regarding the disposition of plaintiff's bail bond was necessarily a part of that judgment and thus would have been before the court in event of a direct appeal. (See *People v. Castile* (1981), 87 Ill. 2d 73, 76, 429 N.E.2d 495.) As in *Morgan*, the plaintiff in the case at bar, did not appeal from the order, but filed this separate action challenging the disposition of a part "necessarily incorporated" into the prior judgment (87 Ill. 2d 73, 76). It therefore follows under our holding in *Morgan* the instant action is an improper collateral attack upon the prior judgment and should be dismissed.

In its decision, the trial court primarily relied on *Chicago Park District v. Kenroy, Inc.* (1978), 58 Ill. App. 3d 879, 374 N.E.2d 670, *aff'd in part* (1980), 78 Ill. 2d 555, 402 N.E.2d 181. We believe, however, *Kenroy* is distinguishable from the instant case. In *Kenroy*, we noted

the issues raised by the plaintiff in the second action would have been "clearly improper" and inappropriate to the initial proceeding. (58 Ill. App. 3d 879, 891.) In the instant case, it is clear that because the bail bond question was necessarily part of the dismissal order, the issue of interest on the bail bond deposit should have been brought before the trial court.

Consequently, there is no necessity for us to consider the remaining contentions by the parties. The judgment appealed from is therefore affirmed.

Dated at Chicago, Illinois, this 15th day of March 1982.

/s/ Thomas A. McGloon
Justice

/s/ John M. O'Connor, Jr.
Justice

/s/ Mayer Goldberg
Justice

FIRST DISTRICT
Filed April 26, 1982

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Plaintiff-Appellant,

81-1517 *v.*

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, and the COUNTY OF COOK, a body politic,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
The Honorable **George J. Schaller**, *Judge Presiding.*

SUPPLEMENTAL RULE 23 ORDER UPON DENIAL OF PETITION FOR REHEARING

On April 5, 1982, plaintiff filed a petition for rehearing of the Rule 23 order entered herein on March 15, 1982. The single point is raised that the order "dismissing the charges" against plaintiff was not an appealable order but was "tantamount to a judgment of acquittal which is expressly nonappealable." Therefore, plaintiff urges he could have raised the question of interest on his bail bond deposit other than by direct appeal.

It is incorrect to state that the charges against plaintiff were dismissed. Plaintiff's brief shows the charge of attempted theft against plaintiff "was stricken with leave

to reinstate." This disposition, sometimes referred to as "SOL", is far different from a *nolle prosequi* which is a termination of the charges by dismissal. An excellent and illuminating discourse on the differences between SOL and *nolle prosequi* is set forth in *People v. Sanders* (1980), 86 Ill. App. 3d 457, commencing at page 465, 407 N.E.2d 951. We therefore reject the statement in the petition for rehearing that the order "dismissing the charge" was "tantamount to an acquittal." We renew the statement in our Rule 23 Order that the order of SOL was appealable under Supreme Court Rule 602. In our opinion, a defendant should have the right to a trial and possible vindication if he so desires.

However, as we attempted to bring out in the original order herein, the trial court which heard the criminal case had complete jurisdiction over the disposition of the bail funds deposited by plaintiff. (Ill. Rev. Stat. 1979, ch. 38, par. 110-7(f).) The SOL order entered by the trial court was the entire basis for the refund of the bail money. It was thus the legal duty of plaintiff to bring the matter of disposition and distribution of the bail funds immediately before the trial court so that it could exercise its legal jurisdiction. The process of waiting and the subsequent institution of an entirely new suit cannot be used to evade the rule against collateral attack. The doctrine of *res judicata* applies here to forbid as a collateral attack all questions regarding the bail funds and their disposition "which could properly have been raised and determined" in the same court which entered the SOL. (*Hughey v. Industrial Commission* (1979), 76 Ill. 2d 577, 582, 394 N.E.2d 1164; *Morris v. Union Oil Co. of California* (1981), 96 Ill. App. 3d 148, 154, 421 N.E.2d 278.

The petition for rehearing is accordingly denied.

GOLDBERG, MCGLOON and O'CONNOR, JR., JJ., concur.

Dated: April 26, 1982.

Unpublished Opinion Of The Circuit Court Of Cook County, Illinois

THE COURT: Plaintiff Jamroch, who posted a bail bond when he was arrested and charged with a crime, and who thereafter received a refund of his bail bond deposit pursuant to the Illinois Code of Criminal Procedure, Chapter 38, Section 110-7(f),

[4]

brought this verified class action complaint against the Clerk of the Circuit Court of Cook County, the Treasurer of Cook County, and Cook County, to recover interest earned by the defendants through investment of bail bond deposits. At bar are two motions: First, a motion filed by the defendants to strike and dismiss the complaint; secondly, a motion filed by the plaintiff for a preliminary injunction. The plaintiff has also filed a motion for certification of the class.

The principal issues presented by the motion to dismiss are: First, whether or not this suit constitutes an impermissible collateral attack upon the prior criminal proceeding; and, secondly, whether or not the defendants' retention of interest earned on bail bond deposits amounts to an unconstitutional taking of private property without just compensation.

Under the allegations of the complaint, in September of 1980, the plaintiff Jamroch was arrested and accused of attempted theft. His bail bond was set at $1,000. In order to secure his freedom and guarantee his appearance in court, he executed and delivered to the Clerk of the Circuit

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Court of Cook County a bail bond in the amount of $1,000. Pursuant to the Illinois Code of Criminal Procedure, Jamroch deposited 10 per cent of the bail with the Clerk.

The Illinois Code of Criminal Procedure requires the Clerk to refund to the accused 90 per cent of his cash deposit when the conditions of the bond have been satisfied and the accused has been discharged.

The plaintiff alleges that on December 16, 1980, the charge against him was stricken with leave to reinstate; that he was discharged from all obligations in the cause; and that the conditions of the bond were fulfilled. The Clerk subsequently disbursed $90 to Jamroch—the statutory refund of 90 per cent of his deposit.

In paragraph 6 of his complaint, the plaintiff alleges upon information and belief that it is the Clerk's practice: One, to commingle bail bond deposits posted by persons accused of crimes so as to form a fund consisting of several million dollars; secondly, to invest the commingled bail bond deposits in interest bearing obligations; and thirdly, to retain the interest earned on the

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bail bond deposits, or to deliver the interest to the County Treasurer pursuant to the provisions of the Timely Deposit of Fees Act for the county's benefit.

According to Jamroch, the interest earned on bail bond deposits is the private property of the depositors and the defendants' retention thereof contravenes the due process clauses of the Federal and State Constitutions.

The class allegations in his capacity as representative of a "class" plaintiff seeks, first, retroactive relief for a ten-year period preceding the February 18, 1981 filing of his complaint, and, secondly, for prospective relief. The proposed class consists of all persons arrested in Cook County on or after February 18, 1971 who, like Jamroch, first, posted a bail bond deposit with the Clerk of the Circuit Court of Cook County; secondly, were discharged of all obligations under the bond; and, thirdly, received a 90 per cent refund without interest.

In paragraph 9 of the complaint, the plaintiff recites the requirements of the Civil Practice Act for the maintenance of a class action

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under Section 57.2, and alleges that whether or not the interest earned on all bail bond deposits constitutes the

private property of the depositors, is one of the questions common to all of the members of the proposed class.

In the prayer for relief plaintiff seeks a preliminary injunction prohibiting the defendants from commingling with other funds, interest earned on bail bond deposits; b, requiring the defendants to deposit the interest in a special protest fund to be administered by the court, and, c, prohibiting the disbursement thereof except by court order; secondly, a declaration that interest earned on bail bond deposits, while the deposits are in the Clerk's possession and control, constitutes the property of the depositors; thirdly, an accounting; and, fourthly, an order of restitution, court costs and attorneys' fees.

The defendants have filed a motion to strike and dismiss the complaint on the grounds; first, that this suit constitutes an impermissible collateral attack upon the criminal proceeding; secondly, the plaintiff has an adequate remedy at

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law; thirdly, that the relief requested by the plaintiff contravenes public policy because, inter alia, the costs of distributing interest to bail bond depositors would far exceed any de minimus benefits incurred by the depositors; fourth, that bail bond deposits and the interest earned thereon are not private property and consequently are not protected by the due process clauses of the State or Federal Constitutions; and, finally, that even if the deposits and interest are private property, no unconstitutional taking has occurred.

The plaintiff has filed a motion for the same preliminary injunctive relief requested in the complaint's prayer for relief, and seeks such an injunction without bond.

Without going into the merits of that, obviously, it is based on information and belief, and is not properly considered by the court at this time.

The first issue raised is whether or not the suit should be dismissed on the grounds that it constitutes an imper-

missible collateral attack upon the criminal proceeding. The

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Restatement of Judgments, in paragraph 11, describes a collateral attack as follows:

"Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'"

In Section 112 of the same statement provides that:

"A collateral attack upon a judgment is one in which the party making the attack seeks to maintain an action on the ground that the judgment is ineffective as a defense to his claim or seeks to maintain a defense to the ground that the judgment is ineffective as a basis of the claim against him. When allowed, it destroys the effect of a judgment . . . a collateral attack is allowed only when the judgment is void."

In the case of Buford versus Chief of the Park District Police, 18 Illinois 2d 265, the court further went into this matter by defining collateral attack on a judgment as an attempt to impeach that judgment in an action other than that in which it was rendered. Although the overturning of the judgment or decree may be important, or even

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necessary to the success of the action or proceeding, an attack on a judgment or decree is collateral where that action or proceeding has an independent purpose and contemplates some other relief or result.

The same theory is promulgated in Chicago Park District case at 58 Illinois Appellate 3d 879, as suggested by plaintiff in its brief.

The defendants argue that Jamroch could and should have petitioned the criminal court for an award of interest, and that the suit at bar constitutes an impermissible collateral attack upon the order entered in the criminal proceeding.

I disagree. I do not consider this suit to constitute a collateral attack upon the criminal proceeding, notwithstanding the failure of either side to furnish the court with a copy of the order in the criminal matter.

According to the authorities that I have cited, supra, indicates to me that I think if the plaintiff prevailed in the suit at bar his success would have little, if any bearing bearing upon, much less impeach or destroy the effect of, the order entered by the criminal court.

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I do not think that a suit for interest earned on a bail bond deposit reasonably can be construed as an attack upon a criminal court's order pertaining to the guilt or innocence of the accused. Therefore, I do not consider movant's point to be well taken and I hold that the suit at bar does not constitute a collateral attack upon the criminal proceeding.

The second matter addressed in the motion was whether this contravenes public policy. The movants have interposed a number of public policy objections to this lawsuit, all of which improperly are predicated upon new matter not contained in the complaint. A motion to strike or dismiss admits the sufficiency of the complaint. The movants have furnished the court with statistics allegedly demonstrating that the costs of administering a program whereby bail bond depositors would receive interest earned on their deposits, would be unjustifiably expensive when compared to the de minimis benefits incurred by the depositors. The plaintiff then in turn attempted to rebut this improper evidence with a mathematical computation of its own. These statistics may well have been proper

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pertaining to motions or class certification or on summary judgment, they are not proper on a motion to dismiss. I have ignored the arguments by both sides on that point.

The next question is whether the—and the major question as far as I'm concerned—is the constitutional one.

Have the defendants violated plaintiff's due process rights? The due process clause of the fifth amendment of the Federal Constitution provides, in part that:

"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This clause was expressly made applicable to state and local governments through the fourteenth amendment, as set out in the Chicago, Burlington and Quincy case, 166 U.S. 226 and the Penn Central Transportation Company case at 438 U.S. 104.

The constitutional question in my judgment involves two subissues: First, whether or not the bail bond deposit and interest earned thereon constitutes the private property of the

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depositor; and, secondly, whether or not the defendants' retention of the interest amounts to an unconstitutional taking thereof. I hold that bail bond deposits do not constitute the private property of the depositors while in the control of the county. Because of that finding, I found it unnecessary to address the second subissue on the question of taking or the class action problem itself.

The Illinois code of Criminal Procedure establishes three methods whereby an accused can secure his pretrial release: One, personal recognizance under Section 110-2; secondly, the execution of a bail bond and delivery of a 10 per cent deposit to the court clerk as set out in Section 110-7, which is the case here; and, finally, the execution of a bail bond and delivery of the full cash amount, or its equivalent, with the clerk as set out in Section 110-8.

If and when an accused is discharged from the obligations of his bail bond, he is issued a refund of his deposit. Under Method 2, which is the case here, the clerk retains 10 per cent of the deposit or 1 per cent of the full amount of

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the bail to cover the costs of handling the bond. No retention charge, however, is imposed upon an accused who deposits the full amount of his bond with the clerk or who is on a personal recognizance.

In upholding the constitutionality of the legislative classification whereby a retention charge is assessed against only those defendants who are released pursuant to this second method, and not against those who post the full amount of their bail with the clerk, the United States Supreme Court remarked that in the Schilb case at 404 U.S., which was called to the court's attention by the defendants, that:

"One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. Any one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State."

While I recognize this observation as dicta, and that it appears in connection with the third method of securing pretrial release, whereby

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no cost retention charge is imposed, rather than the method involved in the case at bar, I nevertheless think that the Court's comment militates against the plaintiff's position that the deposit remains his private property while in the custody of the county.

As has been pointed out by the parties, this is not the first time that an accused sued the Clerk of the Circuit Court of Cook County to recover interest generated by the Clerk's investment of bail bond deposits.

In the Gonzalez case, 30 Illinois Appellate 3d, the Appellate Court upheld Judge Cohen's dismissal for failure to state a cause of action of a suit to recover interest on bail bond deposits.

There, the plaintiff had argued that the Clerk was his trustee or other fiduciary and was obligated to account to

the plaintiff for the profits, which was the interest, derived from the trust, which was the bail bond deposit.

The court stated the rule that the interest generally cannot be recovered in the absence of a contract or statute providing otherwise, noting that the statute in question did not

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entitle a bail bond depositor to recover interest, and the court held that:

"By its silence on the subject of interest for temporary deposits, the Code of Criminal Procedure forecloses such a remedy to depositors."

Jamroch argues that his suit is predicated upon the theory that his due process rights have been violated; Gonzalez was predicated upon the entirely different theory that bail bond deposits comprise a trust fund; that the constitutional question raised by Jamroch was not involved in the Gonzalez case; and consequently Gonzalez does not compel this court to grant the motion to dismiss.

Jamroch further contends that Gonzalez implicitly has been overruled by two recent cases: First was Webb's Fabulous Pharmacies, 101 Supreme Court 446, which was cited by plaintiff, where the interest was earned on an interpleader fund, the conflicting claimants rather than the county were entitled to recover the interest; and secondly, Morton Grove Park District versus American National Bank, 78 Illinois 2d 353,

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where the interest earned on the condemnation fund, the condemnees were entitled to recover the interest.

Webb, which was decided by the United States Supreme Court in December of '80, presented the following issue:

"Where it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by

another statute, is also charged for the clerk's services in receiving the fund into the registry."

In the Webb case, one corporation, Eckerd's, entered into a contract to purchase another corporation, the Webb. In preparation for closing the purchaser Eckerd's, discovered that the seller's debts exceeded the purchase price. In order to protect itself from the claims of the insolvent seller's creditors, purchaser Eckerd's filed suit in a Florida state court, interpleading Webb's and its creditors and depositing the purchase price with the clerk of the court.

The court ordered the clerk to invest

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the interpleader stake in an interest-bearing account. Although a Florida statute provided that interest belonged to the clerk, the court withheld its ruling as to whether the interest should be distributed to the clerk or to the creditors. The clerk invested the money, and deducted his statutory fee from the stake.

About a year later, the court appointed a receiver for the interpleader fund, and ruled that the interest earned on the stake should be distributed to the receiver, and thus to the creditors, rather than the court clerk.

The Florida Supreme Court reversed on the ground that the interpleader stake was public property while in the clerk's account.

The United States Supreme Court reversed, upheld the decision of the circuit court, and held that the Florida statute was a constitutionally proscribed taking of private property without just compensation insofar as it empowered the clerk to appropriate interest earned on interpleader deposits.

The Court observed that Florida statutes permitted the county to recover two fees: First, the clerk's fee, and then

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secondly, the interest; that only the second was disputed; that the statute failed the rational basis test because the interest retained by the clerk was not reasonably related

to the services rendered or to court costs; that the principal amount of the interpleader funds plainly was private property; that the interpleader fund could not be characterized as public money merely because it temporarily was held by the court; and that:

"A mere unilateral expectation or an abstract need is not a property interest entitled to protection . . . . Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county, and it was held only for the purpose of making a fair distribution among those creditors. Eventually and inevitably, that fund, less proper charges authorized by the court, would be distributed among creditors as their claims were recognized

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by the court. The creditors thus had a state-created property right to their respective portions of the fund."

The court went on to say:

"We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee for services rendered based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County's taking unto itself, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders."

Plaintiff Jamroch argues that the bail bond fund in the case at bar is analogous to the

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interpleader fund in Webb's and that the defendants' retention of interest generated by bail bonds consequently must be regarded as an unconstitutional violation of the plaintiff's due process rights. I disagree.

I am also hoarse.

In Webb's, the interpleader fund was concededly private, and was held solely for the purpose of future distribution to the company's creditors. In fact, the Court emphasized that the money inevitably would be disbursed to the creditors. In the case at bar, however, the bail bond fund is not concededly private. Moreover, there is no guarantee that a bail bond depositor inevitably will recover the deposit, because it might be forfeited by his nonappearance, or applied in satisfaction of a fine. These considerations, in my opinion, militate in favor of a finding that bail bond deposits, while in the control of the county, are not the private property of the depositors.

Plaintiff further argues that the deposit must be treated as his private property because it was neither forfeited nor applied to satisfy

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the fine. I disagree again. Plaintiff is looking at the deposit retrospectively. I think that a retrospective determination of whether or not the deposit constitutes private property would be wrong. The interest is earned while the money is in the county's control and, while the money is so situated, the depositor has absolutely no guarantee of recovering it.

Therefore, the court holds that a bail bond deposit, while in the county's control, is not the private property of the depositor, irrespective of whether or not the deposit eventually is refunded to the depositor.

The second case upon which the plaintiff places his primary reliance is a Morton Grove Park District case. There, the Morton Grove Park District condemned land owned by the defendants. In an eminent domain proceeding, the defendants were awarded the fair market

value of the land, as determined by the jury, together with statutory interest.

The condemnor park district deposited the amount of the judgment with the county treasurer. The condemnees had the following choice:

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they could withdraw the funds and forego an appeal, or they could appeal and forego the immediate possession of the funds. The condemnees chose to appeal the amount of the award. Meanwhile, the park district had the use and possession of the land, and the county treasurer invested the condemnation funds in interest-bearing obligations. When the defendant condemnees were denied leave to appeal, they petitioned for recovery of the interest earned on the deposited condemnation funds as a result of the county treasurer's investment.

The Illinois Supreme Court held that the condemnees were entitled to recover the interest. The court reasoned that the condemnation funds deposited with the county treasurer were the private property of the condemnees because the condemnees had the right to withdraw the funds at any time if they were willing to abandon their appeal.

Unlike that circumstance, a bail bond depositor is not entitled to withdraw his bail bond deposit at any time he may choose. He does not have the right to possess, use, enjoy, and dispose

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of the deposit—right associated with the ownership of property. The interest of a bail bond depositor is, in my opinion, nothing more than an expectation that the deposit will be refunded. As the Supreme Court observed in Webb's, the due process clause does not protect mere unilateral expectations and therefore does not support the plaintiff's claim for interest.

Finally, the People versus Dabbs at 24 Illinois Appellate 3d, which is not cited by either party, in that case a bail bond depositor was awarded a refund of the

deposit plus interest. There, the defendant was charged with burglary. He posted a bail bond, which was forfeited after he failed to appear for arraignment. The county became a judgment creditor of the defendant with respect to the full amount of the bail bond. A higher bail subsequently was set. The defendant's mother, as surety, posted the higher bail bond for son. The conditions of that second bail bond were fulfilled. The trial court, however, refused to refund the deposit to the defendant's mother. Instead, it ordered that the money be disbursed to the county in satisfaction of the debt created

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by the first, the forfeited, bail bond. The trial court ordered the clerk to invest the funds pending appeal.

The Appellate Court reversed and held that the mother was entitled to the balance of the deposit with interest after the 10 per cent costs are deducted.

Dabbs does not support the plaintiff's position. The Appellate Court in effect held there that as soon as the conditions of the bond had been satisfied, the deposit was the private property of the defendant's mother, rather than the property of the county. Accordingly, the interest, which began to accrue not when the money initially was deposited with the county, but rather after the obligations of the bond had been discharged, belonged to the defendant's mother.

Accordingly, gentlemen, the motion to dismiss is granted. This lawsuit boils down to the following question of constitutional law—whether or not bail bond deposits constitute the private property of the depositor so as to fall within the scope of the due process clause.

I hold that such bail bond deposits,

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while in the control of the county, are not the private property of the depositors. Therefore, the county's retention of the interest generated by such deposits does not violate the due process rights of those who post bail bonds.

I specifically indicate that my ruling is based exclusively upon the constitutional question. I have held that this suit does not constitute a collateral attack upon the prior criminal proceeding.

I have held that the public policy considerations should not be considered as they are not properly part of the motion to dismiss; and I have indicated since the preliminary injunction was based on information and belief, it should be given no consideration at this time.

All right, gentlemen, you may make any record you desire.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT CHANCERY

JEROME P. JAMROCH

Plaintiff

No. 81 CH 1052 *v.*

MORGAN M. FINLEY, et al.

Defendant

ORDER

This cause coming to be heard on defendants' motion to strike and dismiss plaintiff's complaint and upon plaintiff's motion for a preliminary injunction and the court being fully advised in the premises:

The court hereby finds that bail bond deposits, while held by the defendants do not constitute the private property of those making the deposits and that the retention of interest earned on said deposits is not violative of the United States or Illinois Constitutions.

It is hereby ordered that for the reasons set forth in the report of the proceedings held this date, plaintiff's complaint is dismissed and plaintiff's motion for a preliminary injunction is denied.

ENTER:

/s/ George J. Schaller
Judge

June 11, 1981

Ill. Rev. Stat., ch. 38, ¶110-7

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) Whenever a defendant who has been admitted to bail utilizes the services of a public defender or other appointed counsel, the amount deposited may be used to reimburse the county funding the legal services.

(h) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings.

The deposit made in accordance with paragraph (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(i) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with paragraph (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

Office-Supreme Court, U.S.
FILED
FEB 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

vs.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

vs.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Petitioner has correctly invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). However, as shown in this Brief, respondents suggest that petitioner has failed to demonstrate any compelling reason for this Court to grant a writ of certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTORY STATEMENT

Morgan M. Finley is the Clerk of the Circuit Court of Cook County. Bail bonds posted by persons accused of crimes are deposited with Finley. It is his practice to invest those deposits, and to pay the interest earned to Edward J. Rosewell, Treasurer of Cook County, for the benefit of Cook County. The retained interest thus benefits all of the residents of Cook County, and indirectly defrays a portion of the costs incurred in maintaining the criminal justice system.

Petitioner was arrested in Cook County and charged with attempted theft. Bond was set at $1,000.00, and pursuant to Ill. Rev. Stat. ch. 38, § 110-7(a), petitioner posted $100.00 (10% of the bond) with Finley.

Eighty-nine days later, the charge against petitioner was stricken with leave to reinstate. Because no charge was then pending, the criminal court ordered that petitioner's bond be refunded. The amount of the refund is governed by Ill. Rev. Stat. ch. 38, § 110-7(f), which provides, in pertinent part:

> When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, *unless the court orders otherwise*, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. (emphasis added)

Petitioner apparently concedes that he had the right, and opportunity, pursuant to § 110-7(f), to request the criminal court to order that the bail refund include any interest earned on the clerk's investment of the

bail deposit. It is undisputed that petitioner failed to make such a request. Accordingly, the clerk, pursuant to § 110-7(f), deducted 10% of the amount deposited as bail bond costs,[1] and refunded the balance ($90.00) to the petitioner.

After waiting two months, petitioner filed this action in the Chancery Division of the Circuit Court of Cook County. The complaint alleges that the clerk invests bail bond deposits, retains the interest earned on those investments, and that the retention constitutes an unconstitutional taking of private property in violation of the Fifth Amendment to the Constitution of the United States.

The respondents filed a motion to dismiss the complaint claiming, *inter alia*, that the matter was barred because of petitioner's failure to raise the taking issue in his earlier criminal proceeding, and because bail bond deposits do not constitute private property. The chancery court found that bail bond deposits are not private property and dismissed the complaint.

The petitioner then appealed to the Illinois Appellate Court, which affirmed the dismissal of the complaint. The Appellate Court found that petitioner had the right and obligation, in his criminal proceeding, to challenge the retention of earned interest. The Appellate Court ruled that petitioner's chancery action was improper because the doctrine of *res judicata* operated to forbid a collateral attack of all questions regarding petitioner's bail funds and their disposition "which could properly have been raised and determined" by the criminal court.

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[1] This Court has previously reviewed and upheld the validity of the deduction. *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971).

The Appellate Court denied a subsequent petition for rehearing, and petitioner then filed a petition for leave to appeal to the Illinois Supreme Court. The Supreme Court denied that petition on October 5, 1982.

I.

PETITIONER HAS FAILED TO DEMONSTRATE ANY VALID REASON WARRANTING THIS COURT'S REVIEW OF THE STATE LAW GROUNDS UPON WHICH THE APPELLATE COURT BASED ITS AFFIRMANCE OF THE DISMISSAL OF PETITIONER'S COMPLAINT

The Illinois Appellate Court specifically held that the petitioner had a duty to raise all questions regarding his bail bond deposit before the criminal court at the time that court ordered a refund of the deposit. Because the petitioner failed to raise the issue of interest retention, the Illinois Appellate Court held that petitioner's claim was barred by *res judicata*. That holding was solely based on established state law.

The petitioner acknowledges that this case was decided by the Illinois Appellate Court on state law grounds, and he concedes that it is not ordinarily the function of this Court to correct errors of state law made by state courts. (Petition, pp.11-12). Although the petitioner correctly notes that there are exceptions to this rule, he incorrectly argues that this case falls within those very limited exceptions. That argument is not well founded.

Briefly summarized, petitioner's argument is that a state court judgment based upon state law grounds is reviewable where the nonfederal grounds upon which the judgment is based were "without any fair or substantial support," or were "untenable". Petitioner further notes that such a judgment is reviewable if based upon a novel

procedural requirement, is "clearly ill founded," or is based upon a state procedural requirement which is not "strictly or regularly followed."

After setting forth the exceptional situations where review of judgments founded on state law is proper, petitioner attempts to equate this case with this Court's decision in *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464, 473, 38 S.Ct. 566 (1918). However, that case is absolutely distinguishable.

In *Postal Telegraph*, the plaintiff had denied that it was a party to an earlier suit, and denied that it was in privity with the party in the earlier suit. The state court had completely and erroneously ignored the denials, and held that *res judicata* barred the second suit. This Court looked behind the *res judicata* label, and determined that the state decision was clearly ill founded because the state court had improperly failed to give effect to Postal Telegraph's denials.

Other than the phrase "res judicata", there is not a hint of similarity between *Postal Telegraph* and this case. Here, petitioner was admittedly a party to the earlier criminal action. The criminal court admittedly ordered a refund of the bail bond deposit. Petitioner unquestionably had an opportunity to litigate his claim for a refund of the interest earned. In similar situations, where parties had earlier opportunities to raise matters but were barred by state court judgments from litigating those matters based upon the application of the doctrine of *res judicata*, this Court has traditionally refused to review state court constructions of state laws. See, *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806 (1956); *Haley v. Breeze*, 144 U.S. 130, 12 S.Ct. 836 (1892); and *Northern Pacific Railroad Co. v. Ellis*, 144 U.S. 458, 12 S.Ct. 724 (1892).

Contrary to petitioner's suggestions, there is nothing novel about the Appellate Court's application of *res judicata* in this case. Rather, *res judicata* is a doctrine which has long been recognized and followed in Illinois. Its application in this case is consistent with its application in earlier Illinois cases.

Here, in affirming the trial court's dismissal of petitioner's complaint, the Appellate Court relied, in part, on its contemporaneous opinion in *Morgan v. Finley*, 105 Ill. App.3d 80, 433 N.E.2d 1047 (1982). In *Morgan*, the plaintiff had been placed under supervision and was ordered to pay a fine and costs.[2] Morgan did not appeal, but in a subsequent class action claimed that the imposition of fines and costs as an incident to supervision was unconstitutional. The *Morgan* Court, relying upon the dissent issued by the Illinois Supreme Court in *Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), and the decision in *Sanner v. Champaign County*, 88 Ill.App.3d 491, 410 N.E.2d 656 (1980), held that the class action constituted "an impermissible collateral attack" on the order which placed the plaintiff on supervision. (105 Ill.App. at 84, 433 N.E.2d at 1049).

Of course, the decisions in *Roth* and *Sanner* were published long before petitioner filed his complaint in this case. Moreover, the decisions in *Roth* and *Sanner* merely followed the established application of *res judicata*. As recently as 1979, in *Hughey v. Industrial Commission*, 76 Ill.2d 577, 582, 394 N.E.2d 1164, 1166 (1979) the Illinois Supreme Court restated the scope of *res judicata* as follows:

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[2] It should be noted that petitioner has misstated the facts in *Morgan* (Petition, p.11). Contrary to petitioner's misstatement, the *Morgan* plaintiffs, as petitioner here, had raised certain issues in their collateral action which had not been raised before the courts which heard their criminal cases.

> "'[T]he conclusiveness of the judgment in such case [the prior action] extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. This rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of due diligence.' 46 Am. Jur.2d *Judgments*, sec. 417, at 585-86."

See also, *Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 154, 421 N.E.2d 278 (1981); *Smith v. Bishop*, 26 Ill.2d 434, 187 N.E.2d 217 (1962); *Midlinsky v. Rubin*, 341 Ill. 378, 386-7, 173 N.E. 368 (1930).

The applicability of *res judicata* to defeat claims of hopeful class litigants was more recently utilized by the Illinois Supreme Court in *DeBruyn v. Elrod*, 84 Ill.2d 128, 137-8, 418 N.E.2d 413, 418 (1981), where the plaintiffs contested the constitutionality of a fee collected in foreclosure actions. Certain class members had been parties to the earlier foreclosure actions, and the Court ruled that the failure of those members to contest the fees in the foreclosure actions barred them from participating in the subsequent class action.

More recently, *res judicata* was utilized to bar class actions challenging the retention of a portion of bail bond deposits permitted under Ill. Rev. Stat. ch. 38, § 110-7(f). In the consolidated appeals of *Walker v. Cockrel* and *Lauth v. County of Lake*, ... Ill.App.3d ..... (Docket Nos. 82-90 and 82-209, decided November 24, 1982), the plaintiffs challenged the retention on Illinois constitutional grounds. Like the petitioner here, those plaintiffs had failed to raise their constitutional claims in the criminal courts. The Illinois Appellate Court, Second District, relying on *Morgan v. Finley*, *supra*, *Sanner v. Champaign County*, *supra*, and *DeBruyn v. Elrod*, *supra*, held that

plaintiffs were required to raise their constitutional issues in the criminal courts, and that plaintiffs' failure barred a collateral attack of the judgments of the criminal courts.

Res judicata was also utilized to defeat an action to recover bail bond deposits in *District 65, Distributive Processing and Office Workers Union v. McKague*, 115 F.Supp. 227 (W.D. Penn. 1953), *appeal dismissed* 216 F.2d 153 (3d Cir. 1954). There, a union had posted bail for several of its indicted members in a state court proceeding. The state court had ordered the court clerk to refund the bond to the attorney (McKague) for the members, and the union then sued McKague, in federal court, for a return of the bail funds. The court dismissed the action, stating:

> "This then becomes an attempt to attack an order of of a court of competent jurisdiction in a collateral proceeding in this court. The law is well settled in Pennsylvania that in the absence of fraud a decree of a court of competent jurisdiction, valid or regular on its face, cannot be impeached by the parties or privies thereto or by a stranger in a collateral proceeding in the same or another court." (115 F.Supp. at 230)

The principal case which petitioner believes demonstrates the error of the Appellate Court in this case is *Chicago Park District v. Kenroy, Inc.*, 58 Ill.App.3d 879, 374 N.E.2d 670, *aff'd in part*, 78 Ill.2d 555, 567 (1980). Petitioner labels the Appellate Court's interpretation of *Kenroy* as "question-begging", and misstates the facts of that case by suggesting that an issue which the *Kenroy* plaintiffs sought to raise in the subsequent action could have been raised in an earlier action.

The plaintiffs in *Kenroy* sought to impose a constructive trust upon funds received as a result of an earlier

eminent domain proceeding. The Illinois Appellate Court rejected a collateral attack defense because the second action, which raised issues of fraud and unjust enrichment, did not seek to impeach or vacate the earlier judgment. Significantly, the Court found that the new issues would have been "clearly improper" in an eminent domain proceeding. (58 Ill.App.3d at 891) The Appellate Court recognized that the earlier judgment "is not open to contradiction or impeachment in any collateral action or proceeding, except for fraud in its procurement . . ." (58 Ill.App.3d at 890). Clearly, the plaintiffs' allegation of fraud in *Kenroy* served to defeat the collateral attack defense.

Of course, no fraud is alleged in the instant case. Quite simply, although petitioner had the right to seek a refund of interest earned on his bail bond deposit when he appeared before the court hearing his criminal case, he chose not to do so. Rather, he waited two months and then instituted this action.

The Appellate Court in this case recognized that petitioner's tactic was fatal, and stated in its Supplemental Rule 23 Order:

> "It was thus the legal duty of plaintiff to bring the matter of disposition and distribution of the bail funds immediately before the trial court so that it could exercise its legal jurisdiction. The process of waiting and the subsequent institution of an entirely new suit cannot be used to evade the rule against collateral attack. The doctrine of res judicata applies here to forbid as a collateral attack all questions regarding the bail funds and their disposition 'which could properly have been raised and determined' in the same court which entered the SOL."

Clearly, there is no basis for petitioner's suggestion that he could not have anticipated that his failure to raise the question of interest in his criminal case would oper-

ate to bar a subsequent and separate action to recover the interest. (Petition, p.14) The doctrine of *res judicata* is not new, and the utilization of *res judicata* to bar subsequent collateral attacks has long been the law in Illinois. As the above authorities demonstrate, the judgment of the Illinois Appellate Court in this case was properly based upon numerous cases, many of which were published before petitioner was arrested.

Petitioner should have, and easily could have, anticipated that his failure to raise the interest issue in the criminal court would bar a subsequent collateral action. Consequently, there is simply no basis for petitioner to claim that the Appellate Court decision was erroneous, or that the decision defeated his "reasonable expectations." Respondents suggest that there is similarly no basis for this Court's review of the state law grounds upon which the Appellate Court based its affirmance of the dismissal of petitioner's complaint.

II.

NO FURTHER REVIEW OF PETITIONER'S CONSTITUTIONAL CHALLENGE OF INTEREST RETENTION IS WARRANTED

A. Respondents' Retention Of Interest Earned On The Investment Of Petitioner's Bail Bond Deposit Does Not Constitute An Uncompensated Taking Of Private Property

Under Point I of his petition, the petitioner argues that the respondents' retention of interest earned on the investment of bail bond deposits constitutes an uncompensated taking of private property similar to the taking found in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980). Petitioner also contends (in claims never before raised in this case) that the retention of interest may constitute an unreasonable con-

dition upon the exercise of his right to bail or would be considered as "excessive bail." (Petition, p.9). Petitioner suggests that review should be granted to clarify these issues.

Respondents suggest that this case is readily and easily distinguishable from *Webb's*, and that the retention of *de minimis* interest does not infringe upon any of the petitioner's constitutional rights.

In *Webb's*, Eckerd's had entered into an agreement to purchase Webb's assets. When, at closing, Webb's debts appeared to exceed the purchase price, Eckerd's filed an interpleader action and tendered the purchase price to the court. The court, pursuant to Florida law, ordered the funds invested, at interest, by the court clerk. Thereafter, a receiver, appointed by the court, sought to recover the interest earned on the fund (an amount in excess of $90,000.00) and the clerk resisted.

In holding that the deposited fund constituted the private property of Webb's creditors, this Court acknowledged the general rule that interest on an interpleaded and deposited fund follows the principal and stated:

> "The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund." (449 U.S. at 161, 101 S.Ct. at 451)

Clearly, *Webb's* involved a situation wherein the investing public official was a mere stakeholder for private liti-

gants, and the public entities represented by the stakeholder never had (and never could have) a possible or legitimate claim to the fund. Unlike this case, the creditors in *Webb's* had a property right in the fund from the moment of deposit, and the fund was not held for the benefit of the stakeholder, the court, or the public entity.

As petitioner must concede, bail bonds are held so as to insure a defendant's appearance at trial. As such, bail bonds are held solely for the benefit of the court. While bail bonds are held by the clerk, the criminal defendant has only a speculative, prospective and contingent claim to a refund. Indeed, it is only after being discharged of all obligations under the bond that an individual becomes entitled to a refund. Moreover, prior to a refund, the bond proceeds may be forfeited (pursuant to Ill. Rev. Stat. ch. 38, § 110-7(h)), utilized to pay fines and costs (pursuant to Ill. Rev. Stat. ch. 38, § 110-7(i)), or paid to the defendant's attorney of record (Ill. Rev. Stat. ch. 38, § 110-7(f)). Quite simply, bail bond deposits are held for the benefit of the court, and the bail bond depositors are not entitled to a refund until after an adjudication and a refund order is entered.

Petitioner argues that the above-described contingencies are inapplicable here because he, and the class he attempts to represent, have already been discharged of all bail obligations and are entitled to a refund of their deposits. Petitioner disclaims an intent to recover interest on behalf of those criminal defendants who have forfeited their bonds or who have had their deposits applied to the payment of fines.[3]

[3] The relief sought in petitioner's complaint is not so limited. The prayer seeks a refund of "all such interest" earned. (Complaint, para. B, p.2; R.C8)

The weakness in petitioner's argument is apparent because ownership at the refund stage of proceedings is not at issue in this case. To the contrary, petitioner has the burden of proving his ownership of the bail deposit while said deposit is held by the clerk. It is during that period of time interest is earned. The trial court recognized the difficulties inherent in petitioner's effort to limit his purported class through a retrospective determination of ownership and the trial court rejected that attempt. Accordingly, the trial court concluded that a bail deposit "is not the private property of the depositor, irrespective of whether or not the deposit is eventually refunded to the depositor." (R.22)

In Illinois, bail bond funds are not held by the clerk of the court as a trustee, or in any other fiduciary capacity, for the benefit of the criminally accused. *Gonzales v. Danaher*, 30 Ill.App.3d 992, 332 N.E.2d 603 (1975) The funds serve a dual purpose: to guarantee the defendant's appearance at trial, and for the creation of a fund from which a judgment for a fine and costs may be satisfied. *People v. Nichols*, 71 Ill.2d 166, 177, 374 N.E.2d 194 (1978). Moreover, the clerk holds bail bond funds *in custodia legis*—in the custody of the law. The clerk serves as the hand of and agent for the court, and the bail funds cannot be garnished or attached by the depositor's creditors. *Gende v. Flemming*, 55 Ill.App.3d 659, 661, 371 N.E.2d 191 (1977); *A-1 Lithoplate, Inc. v. AFS Publishing Co.*, 66 Ill.App.3d 560, 562, 384 N.E.2d 395 (1978). While the funds are held by the clerk, the depositor loses all vestiges of ownership and only the court can lay claim to the funds. This status continues until the criminal court orders a refund of the bail.

This Court has reached a similar conclusion. In *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971), the Court was called upon to review the constitutionality of the Illinois

statutory system whereby clerks of the court are permitted to retain 10% of bail bond deposits. (Ill. Rev. Stat. ch. 38, § 110-7(f).) In upholding the Illinois bail bond system as against a claim of a violation of equal protection, the Court observed:

> "One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of deposit; *presumably, at least, its interim possession by the State accrues to the benefit of the State.*" (404 U.S. at 367, 92 S.Ct. at 486; emphasis added)

In the instant case, petitioner seeks to recover the interest earned on his $90.00 bail bond refund for the period of deposit—89 days. While it is true that by depositing the bail bond funds with the clerk, petitioner lost an opportunity to invest those funds elsewhere, this lost opportunity does not constitute a "taking". The mere loss of the ability to exploit one's property does not establish a "taking", *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S.Ct. 2646 (1978), *rehearing denied* 99 S.Ct. 226, and a mere lessening of property value, as opposed to an appropriation, is a permissible restriction on the use of that property. *Andrus v. Allard*, 444 U.S. 51, 65-6, 100 S.Ct. 318, 328 (1979)

This is particularly true where, as here, a claimant's taking argument is based upon speculative profitability. Because courts are not "especially competent" to predict profitability, an interest in anticipated gains "has traditionally been viewed as less compelling than other property-related interests." (*Andrus v. Allard, supra*, 444 U.S. at 66.)

Although the Illinois Appellate Court did not decide petitioner's constitutional claim, respondents suggest that

the trial court properly found that bail bond deposits do not constitute the private property of the depositors, and properly held that the retention of interest earned on the investment of those deposits does not constitute an unconstitutional taking of private property. No further review of this issue is necessary or warranted.

B. Petitioner's Challenge Of Interest Retention, Based Upon Eighth Amendment Grounds, Has Been Improperly Raised In This Court

Petitioner has belatedly, and improperly, suggested that the retention of interest earned on the investment of his bail bond deposit may constitute an unreasonable condition upon his exercise of the right to bail, or may transform his $100.00 bail deposit to the level of "excessive bail." (Petition, at p.9) Petitioner is wrong.

There is no logical connection between the retention of interest earned on bail bond investments and the Eighth Amendment's prohibition of excessive bail. Quite simply, regardless of whether or not interest is retained, the initial amount paid by the criminally accused to secure his freedom pending trial remains the same. Petitioner's citations of *Stack v. Boyle*, 342 U.S. 1 (1951) (where the trial court improperly failed to separately consider bail amounts for several defendants), *Cohen v. United States*, 82 S.Ct. 526 (1962) (where an appeal bond was set at a level sufficient to guarantee payment of a "committed fine"), and *United States v. Skrypeck*, 505 F.2d 458 (D.C. cir. 1974) (where a recognizance bond was improperly revoked because of a failure to appear for the preparation of a pre-sentence report) have no relevance to this case.

In addition, and perhaps of more significance, it should be noted that petitioner has raised the issue of excessive bail for the first time in this Court. Petitioner's claim in the courts below rested solely on the taking provisions of

the Fifth Amendment to the United States Constitution and Article I, Section 15 of the 1970 Illinois Constitution. As this Court stated in *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162 (1969)

> "It was very early decided that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

See also, *Oxley Stave Company v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709 (1897), and *Whitney v. California*, 274 U.S. 357, 362, 47 S.Ct. 641 (1927).

Clearly, petitioner's excessive bail claim is not properly before this Court. Had petitioner desired to challenge interest retention on an Eighth Amendment ground, he should have raised that challenge in the Illinois criminal and chancery courts. Petitioner's failure bars a review of his belated challenge in this Court.

CONCLUSION

For the foregoing reasons, respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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